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No. ____
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IN THE

Supreme Court of the United States

ABDUL RAOUF HASAN KHALIL,
Petitioner,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A.,
BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A.,
BANK OF CREDIT AND COMMERCE INTERNATIONAL
(OVERSEAS) LIMITED, INTERNATIONAL CREDIT AND
INVESTMENT COMPANY (OVERSEAS) LIMITED,
ICIC HOLDINGS LIMITED, AND
CREDIT AND FINANCE COMPANY LIMITED,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a corporation seeking treble damages under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act predicated on the actions of its former officers, directors and shareholders can demonstrate that it suffered an injury *by reason of* the alleged RICO violations when:

(a) The corporation was the immediate and primary beneficiary, as opposed to the target, of the alleged RICO activity;

(b) The injury claimed by the corporation was not the preconceived purpose of the alleged RICO activity; and

(c) The corporation's interests were served, rather than harmed, by the alleged racketeering until the racketeering was exposed and prosecuted by the intended victims.

2. Whether the Court should grant review of the judgment below to resolve the express conflict between the opinion of the District of Columbia Circuit in this case and the opinions of the Second and Seventh Circuits in *In re American Express Co. Shareholder Litigation*, 39 F.3d 395 (2d Cir. 1994), and *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994), with regard to the question presented.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Abdul Raouf Hasan Khalil, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 30, 2000.

OPINIONS BELOW

The opinion of the court of appeals for which review is sought, *BCCI Holdings (Luxembourg), S.A. v. Khalil*, is reported at 214 F.3d 168, and is reprinted in the appendix hereto, App., pp. 1a-12a.

The opinion of the district court holding that respondents had suffered an injury by reason of the alleged RICO activity within the meaning of 18 U.S.C. § 1964(c) is reported at 56 F.Supp.2d 14, and is reprinted at App., pp. 13a-113a.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2000. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, provides in pertinent part as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains . . . .

Sections 1962(a) through (d) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, are reprinted in pertinent part at App., pp. 114a-115a.

STATEMENT OF THE CASE

A. The Respondents' Claims Against the Petitioner

In this suit, the court-appointed liquidators of the failed Bank of Credit and Commerce International ("BCCI") sued the petitioner, Abdul Raouf Hasan Khalil ("Khalil"), to recover damages allegedly suffered by BCCI by reason of violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a)-(d), common law fraud, unjust enrichment and conversion. Respondents alleged that Khalil participated in a conspiracy by which BCCI illegally sought to acquire ownership of First

American Corporation and First American Bankshares, Inc. ("First American") through the use of secret nominee shareholders. Respondents further alleged that Khalil agreed to allow BCCI to use his name to hide non-performing assets and substantial losses from banking regulators while it expanded its operations. Respondents' complaint against petitioners is reprinted in full at App., pp. 116a-191a.

Count I of respondents' complaint alleged that Khalil violated §§ 1962(b), (c) and (d) by allowing BCCI to purchase First American shares in his name with the proceeds of sham, non-recourse loans without disclosing to the United States Federal Reserve that BCCI not only financed the purchase, but was the true beneficial owner of the shares. App., pp. 131a-134a, 156a-162a. Count I further alleged that Khalil gave false testimony to the Federal Reserve Board of Governors concerning the true nature of his purchase in order to obtain regulatory approval. App., pp. 131a-132a, 160a.

Count II of respondents' complaint alleged that Khalil violated §§ 1962(c)-(d) and § 1964(c) by participating in a scheme to manipulate the assets, liabilities and capital of BCCI to give BCCI the false appearance of solvency and thereby prevent regulatory scrutiny. App., pp. 136a-140a, 162-172a. Count II specifically alleged that Khalil allowed BCCI to use his name in connection with hundreds of transactions carried out by BCCI to falsely inflate its capital, generate false profits, conceal non-performing loans and hide huge losses sustained by its Treasury Division in high-risk trading operations. App., pp. 136a-140a.

Count III alleged that Khalil conducted and conspired to conduct the affairs of a brokerage company known as Capcom Financial Services Limited and its subsidiaries ("Capcom") through a pattern of racketeering in violation of §§ 1962(c)-(d) and § 1964(d). App., pp. 172a-184a. The respondents contended that Khalil and others created Capcom for the purpose of siphoning funds from the BCCI Treasury

Division. App., pp. 141a-148a. The funds were then used to capitalize Capcom, fund BCCI's trading operations and conceal non-performing loans on BCCI's books. *Id.*

Count IV alleged that Khalil violated §§ 1962(a) and (d) and § 1964(c) by receiving income from BCCI through a pattern of racketeering and using such income to establish and operate Capcom. App., pp. 184a-188a.

Finally, the respondents asserted claims of common law fraud, conversion and unjust enrichment against Khalil in Counts V, VI and VII. App., pp. 189a-191a.

Khalil denied any wrongdoing and maintained throughout the district court proceedings that he was not the proximate cause of any damages sustained by the respondents.

B. The Proceedings in the District Court

The case was tried to the district court without a jury in January and February 1999. The uncontroverted evidence at trial established that BCCI was neither the target nor an intended victim of the alleged RICO activity and that BCCI's interests were served by the alleged racketeering until the racketeering was exposed and prosecuted by First American and banking regulators around the world. Swaleh Naqvi, the chief executive officer of BCCI and a key figure in the alleged racketeering, testified that the alleged RICO activity was intended to benefit BCCI by allowing BCCI to expand its operations and enhance its profitability. App., pp. 192a-200a. This testimony was not disputed by respondents. With Khalil's assistance as an alleged nominee, BCCI was able to secretly acquire and maintain control over what was once the largest financial institution in Washington, D.C. And, by using Khalil's name to hide non-performing assets and to trade in excess of the limits allowed by law, BCCI was able to inflate its profits and avoid regulatory scrutiny while expanding its operations.

In its findings of fact and conclusions of law, the district court concluded that respondents had sustained injuries "by reason of" the alleged RICO violations within the meaning of 18 U.S.C. § 1964(c). Specifically, the district court found that the following items constituted losses proximately caused by the alleged RICO activity: (1) payments made by BCCI to Khalil as compensation for his alleged participation; (2) expenses paid by BCCI on behalf of Khalil as further compensation for his alleged participation; (3) money transferred from BCCI to Capcom which was used by Capcom to fund trading activities carried out on behalf of BCCI and to conceal non-performing assets that appeared on BCCI's books; and (4) trading losses suffered by BCCI ostensibly as a result of the use of Khalil's name. 56 F.Supp.2d at 55-57. The district court reasoned as follows:

> . . . [L]osses were directly attributable to Khalil's acquisition of a nominal interest in First American through a pattern of racketeering activity. For example, the $27.5 million paid to Khalil, although extorted from BCCI, was a transaction cost proximately imposed on BCCI by virtue of its use of nominees to accomplish the illegal acquisition of, and maintain its control over, First American. Additionally, payment of Khalil's expenses for his services as a nominee were also caused by the pattern of racketeering activity by which Khalil and BCCI acquired their respective interests in First American.

56 F.Supp.2d at 56.

The district court entered final judgment against Khalil on all claims asserted in the respondents' complaint, with the exception of Count IV. App., pp. 201a-204a. As to Count IV, the district court found that the respondents did not prove injury proximately flowing from Khalil's use or investment of funds transferred by BCCI to Capcom. 56 F.Supp.2d at 62-63.

The total non-duplicative amount of actual damages awarded to the respondents was $388,402,534, which the district court then trebled under 18 U.S.C. § 1964(c) for a total of $1,165,207,602. 56 F.Supp.2d at 68-69.

C. The Opinion of the Court of Appeals

Khalil appealed the district court's causation finding, relying on this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-270 (1992), which requires RICO plaintiffs to prove a direct relation between the injury asserted and the alleged injurious conduct; the decisions of the Second and Seventh Circuits in *In re American Express Co. Shareholder Litigation*, 39 F.3d 395 (2d Cir. 1994), and *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994), holding that no proximate cause can exist in a RICO suit brought by a corporation against its officers and directors where the corporation is neither the target nor an intended victim of the alleged racketeering; and the decision of the United States District Court for the Southern District of New York in *BCCI Holdings (Luxembourg), S.A. v. Pharaon*, 43 F.Supp.2d 359 (S.D.N.Y. 1999), dismissing an *identical* complaint filed by respondents against another alleged secret BCCI nominee on the ground that respondents could not satisfy the proximate cause requirement of RICO § 1964(c) because BCCI was neither a target nor an intended victim of the alleged nominee scheme.

The court of appeals reversed the judgment of the district court in regard to the trading losses sustained by BCCI. The court of appeals stated that it could find "no record evidence demonstrating that this specific set of losses is directly traceable to the ability of the perpetrators to hide the losses in Mr. Khalil's name." 214 F.3d at 174.

However, the court of appeals expressly rejected the target analysis of the Second and Seventh Circuits and affirmed the

district court's judgment in all other respects. The court of appeals reasoned as follows:

> The Court [in *Holmes*] never suggests, however, that the only or best way to prove proximate cause is for plaintiff to prove he was the "intended target" and that the injury was the "preconceived purpose" of the RICO activity. We therefore reject [Khalil's] highly restrictive reading of RICO.

214 F.3d at 174.

Khalil seeks review in this Court.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Creates A Circuit Conflict By Holding That Proximate Cause Can Exist In A Suit By A Corporation To Recover Treble Damages Under RICO, 18 U.S.C. § 1964(c), Even Though The Corporation Was The Immediate And Primary Beneficiary Of The Alleged RICO Activity And Even Though The Corporation's Interests Were Served By Such Activity Until The Racketeering Was Exposed And Prosecuted By The Intended Victims.

Rule 10 of the Rules of this Court provides that one of the considerations in favor of granting a petition for writ of certiorari is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The decision of the District of Columbia Circuit in the present case directly conflicts with the decision of the Second Circuit in *In re American Express Co. Shareholder Litigation*, 39 F.3d 395 (2d Cir. 1994), and the decision of the Seventh Circuit in *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994), both of which require a corporation seeking damages under RICO, 18 U.S.C. § 1964(c), based on the actions of its former officers and directors, to prove that it was either the

target or an intended victim of the alleged RICO activity, and that the alleged injury was the preconceived purpose or intended consequence of the RICO violations. Otherwise, there can be no proximate cause between the alleged RICO violations and the injury claimed by the corporation.

In *In re American Express*, the Second Circuit affirmed the dismissal of a RICO action brought by the shareholders of American Express on behalf of the corporation against certain present and former officers, directors and employees of the corporation on the ground that plaintiffs' allegations failed to satisfy RICO's proximate cause requirement. The complaint alleged that the defendants had conspired with various journalists, politicians and other third parties in a scheme to defame a competitor (Safra) in violation of RICO, 18 U.S.C. §§ 1962(c) and (d). Safra had applied to open a new bank (Safra Republic Holdings, S.A.) to compete with American Express. The intent of the scheme was to publish defamatory material about Safra linking him to organized crime, money laundering and drug trafficking and thereby sabotage his application for a bank license. Safra, Safra Republic Bank Holdings, S.A., and American Express were alleged victims of the scheme. It was also alleged that the corporation had sustained injuries to its business and property by reason of the alleged RICO violations in that it had suffered lost sales and profits, had been exposed to liability by the defendants' acts, and had incurred substantial costs in connection with the alleged scheme, including approximately $2.6 million in bribes paid to certain politicians for their participation in the scheme.

In concluding that the plaintiffs' allegations failed to satisfy RICO's proximate cause requirement, the Second Circuit stated:

> Any fair reading of the complaint in the instant case discloses that the RICO defendants' "preconceived purpose" was most assuredly not to cause some $10

> million in losses to American Express. Instead, the complaint consistently alleges that the RICO defendants' actions, however misguided and injurious to American Express in the end, were undertaken to further American Express's competitive interests . . . .
>
> The injuries alleged thus were neither the "preconceived purpose" nor the "intended consequence" of the RICO defendants' acts. Moreover, any losses to American Express were caused only because the scheme itself was exposed and thus failed. Therefore, the harm to American Express was neither the "necessary result" of the scheme nor more "foreseeable" than Hecht's loss of commissions when his employer's scheme was revealed.[1]

39 F.3d at 400.

Similarly, in *Mendelovitz*, the plaintiff brought a shareholders derivative suit on behalf of Comdisco, Inc. against ten of Comdisco's directors alleging RICO violations arising from a lease dispute between Comdisco and International Business Machines ("IBM"). The complaint alleged that the defendants had engaged in a computer "chop shop" scheme in which they unlawfully subleased an IBM computer system, sold some of its component parts, and then fraudulently concealed their unlawful activities by making various misrepresentations to the press, the Securities and Exchange Commission, and Comdisco's customers to the effect that Comdisco had a right under its lease with IBM to engage in such activities. It was further alleged that, as a proximate result of the defendants' RICO activity, Comdisco sustained damages in the form of (1) expenses incurred in

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[1] "Hecht" refers to the plaintiff in *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 22-24 (2d Cir. 1990), which held that an employee could not recover in a RICO action against his employer for loss of commissions suffered when a customer discovered his employer's fraud, because the employee was neither the target of the racketeering enterprise nor the competitor nor a customer of the racketeers.

connection with litigation brought by IBM against Comdisco based on the defendants' unlawful acts (including both attorneys' fees and potential damages) and (2) decreased present and future sales from loss of good will. The district court entered summary judgment for the defendants. On appeal, the Seventh Circuit held that a corporation does not have standing to bring a RICO action for damages allegedly accruing from actions of its directors or officers against third parties, as there can be no proximate cause, and affirmed the judgment of the district court.

Application of *In re American Express* and *Mendelovitz* to the present case would require reversal of the decision reached below, as is demonstrated by *BCCI Holdings (Luxembourg), S.A. v. Pharaon*, 43 F.Supp.2d 359 (S.D.N.Y. 1999), a case virtually identical to the present case, save for the name of the defendant. In *Pharaon*, the court dismissed the respondents' complaint against another alleged BCCI nominee, which alleged a scheme to secretly acquire Independence Bank of California. There, as here, the liquidators of BCCI alleged that the former officers and directors of BCCI sought to unlawfully acquire and maintain control over the bank through the use of secret nominees in violation of RICO §§ 1962(b)-(d). There, as here, the liquidators alleged that the defendant assisted the former officers and directors of BCCI in manipulating the books and records of BCCI to avoid regulatory scrutiny. And there, as here, the liquidators alleged that one of the purposes of the scheme was to siphon capital from BCCI for the defendant's personal gain.

In dismissing the complaint for failure to satisfy the proximate cause requirement of RICO § 1964(c), the court applied the holding of the Second Circuit in *In re American Express* to the facts before it and concluded as follows:

> Any fair reading of the complaint in this case discloses that Pharaon and former corrupt managers of BCCI did

> not have a "preconceived purpose" to cause harm to the BCCI Group. Nor do the allegations in the complaint suggest that the BCCI Group itself was the "intended target of the RICO violations." . . . Pharaon's actions, however misguided and ultimately harmful to the BCCI Group, were undertaken to advance the interests of the BCCI Group in surreptitiously acquiring a U.S. Bank despite federal law prohibiting such an acquisition. Banking regulators—not plaintiffs—were targeted and defrauded by the scheme detailed in the complaint. It is equally clear that the harm caused to the plaintiff resulted from the exposure, investigation, and prosecution of the scheme by regulatory authorities, rather than from the predicate acts of wire fraud . . . .

43 F.Supp.2d at 366.

Based on the foregoing, respondents' RICO claims against Khalil would not have survived had they been filed in either the Second or Seventh Circuits. Khalil seeks review in this Court to resolve this circuit conflict.

II. The Decision Of The Court Of Appeals Is Contrary To The Decision Of This Court In *Holmes v. Securities Investors Protection Corp.*, 503 U.S. 258 (1992), Requiring A RICO Plaintiff To Prove A Direct Relation Between The Injury Asserted And The Injurious Conduct Alleged.

Although the decision below is in direct conflict with the decisions of the Second and Seventh Circuits, all three decisions are based on this Court's opinion in *Holmes v. Securities Investors Protection Corp.*, 503 U.S. 258 (1992).

RICO § 1964(c) provides that any person who is injured in his business or property "by reason of" a violation of § 1962 may bring suit therefor and recover treble damages. In *Holmes*, the Court interpreted this "by reason of" language to require RICO plaintiffs to show proximate cause which, in

turn, requires the existence of "a direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 267-68. "Thus, a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." 503 U.S. at 268-69. The Court explained that a proper analysis of proximate causation for purposes of RICO involves three policy considerations: (1) whether there are more direct victims who can be counted on to vindicate the goals of RICO as private attorney generals; (2) whether it will be difficult to ascertain the amount of plaintiff's actual damages attributable to the defendant's conduct, as opposed to other, independent factors; and (3) whether it will be difficult to apportion damages among all potential plaintiffs, who would otherwise each be entitled to recover the full treble damages. 503 U.S. at 269-71.

The Second Circuit's decision in *In re American Express* was based on a well-reasoned and thorough analysis of these policy considerations as applied to the facts in that case. 39 F.3d at 401. The same is true of the Seventh Circuit's decision in *Mendelovitz*. 40 F.3d 185-86. In sharp contrast, the opinion of the District of Columbia Circuit contains no such analysis. 214 F.3d at 173-74. Neither does the opinion of the district court. 56 F.Supp.2d at 56.

Two of *Holmes'* three policy considerations are applicable here. First, there are more direct victims who can be counted on to act as private attorney generals to vindicate the goals of RICO—detection and prosecution of the alleged racketeering. First American and banking regulators, not BCCI, were the intended and primary victims of the alleged racketeering, and both could be counted on to vindicate the law. Indeed, after the alleged scheme was exposed by banking regulators, First American was the first to file a RICO action for treble damages against the alleged perpetrators, including Khalil.

See, First American Corp. v. Zayed, Civ. No. 93-1309 (JHG) (D.D.C.). It was only after the direct victims had already filed suit that respondents sought to vindicate the law—which is not surprising in light of the fact that BCCI's interests were served by the scheme until it was exposed. BCCI and respondents were therefore motivated to wait and do nothing, as opposed to detect and prosecute the alleged racketeering. For these reasons, BCCI and other similarly situated corporations who stand to benefit from the alleged RICO activity cannot be counted on to vindicate the goals of RICO.

Second, the task of ascertaining the amount of damages, if any, suffered by a corporation who is the intended beneficiary of the alleged RICO activity would require courts to engage in the type of difficult and complex damages analysis that the Court in *Holmes* sought to avoid. While BCCI may have incurred costs in connection with the alleged RICO activity, it is uncontroverted that BCCI also received substantial benefits. Khalil's alleged agreement to act as a nominee allowed BCCI to expand its operations by acquiring what was once the largest financial institution in Washington, D.C. Similarly, Khalil's alleged agreement to allow BCCI to use his name to hide financial losses allowed BCCI to avoid regulatory scrutiny while it continued to expand its operations. In order to determine whether BCCI was injured by reason of the alleged RICO violations and, if so, to ascertain the amount of damages, if any, sustained by BCCI as a direct and proximate result, the court would have to engage in a difficult and complex cost/benefit analysis in which the fees and expenses paid by BCCI to and for the benefit of Khalil for his alleged assistance would have to be weighed against the increased revenues and other benefits received by BCCI through its acquisition of First American. *See, In re Teledyne Defense Contracting Derivative Litigation*, 849 F.Supp. 1369, 1374 (C.D. Cal. 1993) (the overall impact of costs incurred by the plaintiff corporation in connection with a RICO scheme carried out by the

corporation's former officers and directors for the benefit of the corporation would require the very sort of damage analysis that § 1964(c) was designed to avoid). *See also*, II AREEDA AND TURNER, ANTITRUST LAW, P336e at 182 (1978) (explaining that antitrust law does not and should not confer on derivative plaintiffs standing to complain of antitrust violations intended to benefit their own corporation because the very "fact" of damage to the corporation is open to question).

The task of ascertaining the amount of damages directly attributable to the alleged RICO activity in the present case is further complicated by the presence of other independent factors in the chain of causation, such as the independent decision on the part of various third parties to expose the alleged racketeering, the independent decision of the banking regulators to close and liquidate BCCI, and the independent decision of the government to prosecute BCCI and force it to forfeit its interest in First American. Had these decisions not been made, BCCI would not only have not been harmed, but may very well have profited handsomely from the alleged RICO violations. *See, Teledyne*, 849 F.Supp. at 1374 ("a persuasive argument can be made that in the instant case Plaintiffs lack RICO standing because the harms to the Corporation were most directly caused by some identifiable intervening fact, *i.e.*, the independent decisions of the whistle-blowers and the government to initiate and prosecute the violations"). *See also, Mendelovitz*, 40 F.3d 185 ("Any damages that Comdisco purportedly may have incurred flow from IBM's decision to sue Comdisco; had IBM not sued, neither set of damages that Mendelovitz alleges could exist").

Based on the foregoing, the decision of the court below is contrary to the decision of this Court in *Holmes* in regard to the question presented.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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